IN THE

Supreme Court of the United States

October Term, 1951.
No. 237.

A. BRIGHAM ROSE and ZELLETTA ROSE; LORI, LTD., INCORPORATED; ZELLETTA M. ROSE and A. BRIGHAM ROSE,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

I.

Respondent states that none of the findings of the Tax Court is challenged by petitioners as clearly erroneous. (Br. 10.) Petitioners, however, did challenge as clearly erroneous the Tax Court's findings of assets, net worth, and income of Rose based upon financial statements of his without eliminating, since Rose was on a cash basis for tax purposes, the accounts receivable which the statements contained. [R. 444; Pet. 7-9.] The Tax Court directly concluded on the basis of said erroneous findings, and said findings only, that, in respect to the individual

petitioners, there was "a substantial increase in their net worth, *during the period involved.*" [R. 450-451. Italics supplied.] Nowhere in its brief does respondent deny this error in the Tax Court's findings.

II.

Respondent, apparently recognizing the damaging effect of this error, now attempts to escape its effect by denying the materiality of the said financial statements. (Br. 10, 11.) Then why were they introduced by respondent in the first place, and over petitioners' objections on the ground of materiality? And why did the Tax Court set forth in detail the figures, erroneously on an accrual basis, which it took from those statements? [R. 444.]

This contention of respondent, moreover, is based solely upon the fact that the dates of these financial statements were not identical with the closing dates of the taxable years involved here. But the Tax Court treated that variance as insignificant, for, as already observed above, it concluded from those financial statements, and those statements only, that there was a substantial increase in the net worth of the individual petitioners "during the period involved." [R. 450-451.] And if the income figures shown on those statements were not pertinent, then why did the Tax Court set them forth for each year? [R. 444.] And if the fact of increase in net worth was not material, then why did the Tax Court place such stress upon it? [R. 450-451.]

III.

As to Lori, respondent cites *Moline Properties v. Commissioner,* 319 U. S. 436, and *Higgins v. Smith,* 308 U. S. 473. The question in those cases, however, was whether the separate entity of the corporation was to be recognized for tax purposes. There is no such question here. The question here is who was the beneficial owner of the income; and respondent concedes that the beneficial owner was Rose. (Br. 3, 4, 12.) It must follow by respondent's own admission that the decision below is in direct conflict with the decisions of the Eighth Circuit cited and quoted from by petitioners in their petition herein, page 14.

IV.

Respondent makes no attempt to challenge petitioner's fourth ground for certiorari.

Conclusion.

Petitioners do not seek in this court to have the deficiencies asserted against petitioners simply expunged. Petitioners seek only to have the cause remanded to the Tax Court for reconsideration of the record under correct principles of law. This, they submit, is required by respondent's own brief.

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Attorney for Petitioners.